

1-1-1996

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Recommended Citation

Laureen Nowlan-Card, "Public Government and Regulatory Participation in Nunavut: Effective Self-Government for the Inuit" (1996) 5 Dal J Leg Stud 31.

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PUBLIC GOVERNMENT AND REGULATORY PARTICIPATION IN NUNAVUT: EFFECTIVE SELF-GOVERNMENT FOR THE INUIT

LAUREEN NOWLAN-CARD[†]

Self-government has been a goal of the Inuit of the Eastern and Central Arctic for decades. In April 1999, the new Nunavut Territory with its own government will become a reality. As the Nunavut government is to be a public government as opposed to an ethnic government, some have argued that what has been created in Nunavut is not truly self-government. This article is a critical analysis of whether the regulatory control and legislative powers derived from the Agreement and the Nunavut Act provide the Inuit in Nunavut with effective self-government. There are three main prerequisites to making self-government a reality: a minimum critical mass of powers, autonomy, and viable implementation mechanisms. This article measures the provisions of the Agreement against the indicia of self-government, paying particular attention to the legislative powers that the Nunavut government will have. The author concludes that despite some weaknesses, the new Nunavut government will mean de facto self-government for the Inuit and provide a precedent showing that self-government can co-exist with Canadian federalism.

Pendant des décennies, l'autonomie gouvernementale a été un objectif des Inuit de l'est et du centre de l'arctique. En avril de 1999, la nouvelle Territoire du Nunavut avec sa propre gouvernement sera établie. Comme le nouveau gouvernement du Nunavut sera un gouvernement public, par opposition à un gouvernement ethnique, quelques personnes ont soutenu que le gouvernement du Nunavut ne donnera pas d'autonomie gouvernementale véritable. Cet article analyse critiquement la question de savoir si les pouvoirs qui découlent de l'Accord et de la Loi sur le Nunavut donnent aux Inuit du Nunavut de l'autonomie gouvernementale efficace. Il y a trois critères qui doivent être satisfaits pour qu'on puisse parler de l'autonomie gouvernementale: un niveau minimum de pouvoirs, de l'autonomie, et des mécanismes de réalisation fiables. Cet article compare les dispositions de

[†] B.A. (Acadia), LL.B anticipated 1996 (Dalhousie). The author would like to thank Patricia Doyle-Bedwell for her editorial comments.

l'Accord avec les indices de l'autonomie gouvernementale, en se tenant compte en particulier aux pouvoirs législatifs que le gouvernement du Nunavut possédera. L'auteur conclut que, malgré quelques faiblesses, le nouveau gouvernement du Nunavut donnera de l'autonomie gouvernementale véritable aux Inuit et donnera un précédent qui démontrera que l'autonomie gouvernementale peut exister à côté du fédéralisme canadien.

INTRODUCTION¹

Self-government has been a goal of the Inuit² for many years. They have lived for decades with many important decisions made by governments in Ottawa or in Yellowknife, governments with which they do not identify. Inuit people want a strong, united voice and a government which is amenable to their traditions, concerns and interests—they want self-government.

In an effort to achieve the goal of self-determination, the Inuit have forged a land claims agreement, *The Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (hereinafter *The Agreement*),³ and have negotiated legislation, the *Nunavut Act*⁴, to implement their own public government. Nothing in these documents identifies the settlement region or its new government as “self-government” *per se*. However, the combination of decision-making powers and institutions created under them can be used to create *de facto* Inuit self-government.

¹ This article does not intend to appropriate the voice of Inuit people. Only they, can truly judge whether they have achieved their goals and whether this is self-government. This article attempts to incorporate to the fullest measure the views expressed by the Inuit people in their own documents. Having lived in small Inuit communities, the author is hopeful that self-government will become a functioning reality in Nunavut.

² This article will use the word “Inuit” as opposed to “Aboriginal Peoples” when referring to the Inuit, in keeping with the Inuit preference not to be labeled Aboriginal since it may tend to de-emphasize their distinctness as Peoples. See Mary Kuptana’s comments in *Toward Reconciliation*, *infra* note 15 at 8.

³ Canada, Department of Indian Affairs and Northern Development and Tungavik Federation of Nunavut, *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, (Ottawa: Minister of Supply and Services, 1993). Passed by Parliament in the *Nunavut Land Claims Agreement Act*, S.C. 1993, c.29.

⁴ S.C. 1993, c.28.

It has been argued that what has been created in Nunavut is not really self-government. Since the Inuit have negotiated these documents with the intent to create a self-governing region, it is important to evaluate their level of success in achieving this goal. The meaning of "self-government" is somewhat elusive, being defined differently by different groups. Rather than become engrossed in this debate, this article will look to the indicia of self-government as espoused by the Inuit in the document *Building Nunavut*⁵ and discussed by the Royal Commission on Aboriginal Peoples in *Partners in Confederation*.⁶ The purpose of this article is to measure the provisions of *The Agreement* and the *Nunavut Act* against these indicia of self-government to determine whether "self-government" is truly being implemented in Nunavut. Specifically, this article will evaluate the elements of these documents which both contribute to self-government in Nunavut and detract from it.

The first section will give a brief overview of the negotiation process which led to *The Agreement* and the ensuing Nunavut legislation. Second, this article will provide a brief overview of *The Agreement* and an overview of the *Nunavut Act*.

If self-government is actually being created in Nunavut, it should possess the key powers necessary for a self-governing entity. The third section of this article will examine provisions of the *Nunavut Act* and *The Agreement* against these key elements to determine if the Nunavut government acquires a "minimum critical mass" of powers necessary to make it self-governing.

As autonomy is at the heart of self-governing institutions, the fourth section will examine the degree of autonomy obtained by the Nunavut government through the *Nunavut Act*.

The fifth section of this article, will focus on the specific provisions in the *Nunavut Act* and *The Agreement* which are designed to smooth problems of implementing the new Nunavut government. The implementation provisions will be measured against the four basic principles identified by the Royal

⁵ Nunavut Constitutional Forum, *Building Nunavut: A working document with a proposal for an Arctic Constitution*, (Nunavut Constitutional Forum, 1983) [hereinafter *Building Nunavut*].

⁶ Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution*, (Ottawa: Minister of Supply and Services, 1993) [hereinafter *Partners in Confederation*].

Commission on Aboriginal Peoples as necessary for successful implementation of self-government.

In the sixth section, this article will examine the ways in which the Inuit situation is distinct from that of other Aboriginal Peoples. Finally, this article will make concluding comments on whether public government can truly be considered self-government for the Inuit in Nunavut.

I. OVERVIEW OF THE NEGOTIATING PROCESS

Many people in the Northwest Territories, especially the Inuit in the Eastern and Central Arctic, do not accept or identify with the current boundaries or governmental system.⁷ Since 1976, the Inuit of the Eastern and Central Arctic have actively pursued division of the Northwest Territories and the creation of a new territory, with its own government, called Nunavut. The majority of people in the Northwest Territories and the overwhelming majority in the Nunavut region have supported such a division. In a 1982 plebiscite, 80% of voters in the Eastern and Central Arctic supported division.⁸ Results were less conclusive in the Western Arctic, but overall 56.5% of those who voted preferred division.⁹

One of the most controversial issues surrounding this land claim settlement, as with other settlements, is the surrender of title clause. Under the federal government's 1986 Land Claims Policy,¹⁰ in order to finalize the land claims agreement, the Inuit were required to agree to the following extinguishment clause:

[The Inuit]cede, release and surrender to Her Majesty
The Queen in Right of Canada, all their aboriginal

⁷ Canadian Arctic Resources Committee, *Aboriginal Self-Government and Constitutional Reform: Setbacks, Opportunities and Arctic Experiences (a national conference held in Ottawa 9-10 June 1987)*, (Ottawa: Canadian Arctic Resources Committee, 1988) [hereinafter *Aboriginal Self-Government and Constitutional Reform*].

⁸ Inuit Committee on National Issues, *Completing Canada: Inuit Approaches to Self-Government*, (Kingston: Institute of Intergovernmental Relations, Queen's University, 1987) at 32.

⁹ *Ibid.*

¹⁰ Canada, Department of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy*, (Ottawa: Minister of Supply and Services, 1987).

claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada.¹¹

In addition, the extinguishment clause precludes the Inuit from bringing any legal action against the Government.¹²

The federal government required land claims in the Northwest Territories to be settled before division¹³ and, in accordance with its 1986 Land Claims Policy,¹⁴ refused to deal with self-government at the land claims table. Self-government has always been on the Inuit agenda and they, along with other Aboriginal nations, have rejected the federal government's policy of separating self-determination from land claims.¹⁵

The establishment of Nunavut and the settlement of land claims in the area are seen by the Inuit as simply two different aspects of one process. They are intertwined, and agreement is required on both issues to achieve Inuit goals. Land is of primary importance in the Inuit culture and way of life. Inuit economies, political systems, family relations, and traditions are derived from their relationship with the land. Thus, in order to maintain their cultural integrity, the Inuit must have rights in their lands and resources. Likewise, political power would be artificial without a land base. Lands and resources can provide a revenue base for the government to function. However, land and resources, without political authority to control the decisions which affect those lands and resources, would also fall short of Inuit goals. In this way, land is inseparably intertwined with the goals of cultural preservation, self-determination, and economic development.

Despite the Inuit's approach to land claims and self-government as interdependent goals, it was an inevitable compromise for them

¹¹ *The Agreement*, *supra* note 3 at Art. 2.7.1.(a).

¹² *Ibid.* at Art. 2.7.1.

¹³ Jull, Peter, *Self-Government for Northern Peoples: Canada and the Circumpolar Story: A report to the Government of the Northwest Territories*, (Yellowknife, N.W.T.: Aboriginal Rights and Constitutional Development Secretariat, undated) at 32.

¹⁴ *Supra* note 10.

¹⁵ Canada, Royal Commission on Aboriginal Peoples, *Toward Reconciliation, Overview of the Fourth Round*, (Ottawa: Minister of Supply and Services, April 1994) [hereinafter *Toward Reconciliation*].

to complete the land claims settlement first, and then pursue self-government for Nunavut.¹⁶ However, in negotiating the land claims settlement, the Inuit negotiators made it known that it would be difficult to get *The Agreement* ratified by their people, because of the large surrender of Inuit title to traditional lands, without a commitment to self-government: "Land ownership is a deeply felt and highly emotive issue, striking at the heart of Inuit self-identity and aspirations."¹⁷ "Inuit feel passionately that they already own all the land in Nunavut. . ."¹⁸ and it is difficult for them to accept a land claim settlement that gives the Crown ownership of approximately 80% of that territory.

Hence, Article 4 of *The Agreement* makes specific reference to a commitment by the federal government to introduce legislation in Parliament to establish a Nunavut Territory and government.¹⁹ Furthermore, the *Political Accord*²⁰, being the precursor to this legislation, was to be completed before ratification of *The Agreement*. So, while the federal government would not deal with self-government *per se* in the land claims agreement, *The Agreement* presented a significant building block for Nunavut's negotiating body, the Tungavik Federation of Nunavut [hereinafter TFN], to further negotiate self-government at a later time.

The Inuit approved *The Agreement* in a Nunavut-wide plebiscite in November 1992. The vote in favour was 85% by those who voted, with 69% of eligible voters casting ballots.²¹ At the time of this plebiscite, the *Political Accord* between the TFN, the Government of Canada, and the Government of the Northwest Territories had reached a consensus as required by Article 4 of *The Agreement*.²² The *Political Accord* reiterated the commitment of the

¹⁶ The Inuit delayed negotiating land issues because they feared this was the only issue with which the Federal Government truly wished to deal.

¹⁷ Merritt, John et al., *Nunavut: Political Choices and Manifest Destiny*, (Ottawa: Canadian Arctic Resources Committee, 1989) at 16.

¹⁸ *Ibid.*

¹⁹ *The Agreement*, *supra* note 3 at Art. 4.

²⁰ Tungavik Federation of Nunavut, Government of Canada and Government of the Northwest Territories, *Nunavut Political Accord*, (Ottawa: Minister of Supply and Services, 1992) [hereinafter *Political Accord*].

²¹ Stilborn, Jack, *Political Change North of 60*, (Ottawa: Minister of Supply and Services, Library of Parliament, 1993) at 13.

²² Consensus was reached in April 1992.

federal government to table legislation for the creation of Nunavut and its government concurrent with the tabling of the land claims legislation.²³ It stated that the Nunavut government would be created by April, 1999,²⁴ and would be vested with full legislative powers similar to those of the Government of the Northwest Territories²⁵ and a core of administrative capacity.²⁶ This document also contained a funding commitment from the federal government. The federal government had agreed to fund the Nunavut government on a similar basis as the Government of the Northwest Territories and to provide funds for the reasonable costs of the creation of the Nunavut government and its operation.²⁷ The *Political Accord* also stated that the parties recognized the importance of training of Inuit people and contained a commitment by the federal government to fund such training initiatives.²⁸ It also specified that a Nunavut Implementation Commission would be created to prepare for the implementation of the Nunavut Government and described its mandate.²⁹ Thus, when the Inuit voted, they knew there was a commitment by the Government of Canada to more than the land claims agreement.

II. OVERVIEW OF THE LAND CLAIMS AGREEMENT

After approximately twenty years of negotiations, on May 25, 1993, a final land claims agreement was signed between the TFN, and the Canadian and Northwest Territories governments. *The Agreement* provides for approximately \$1.15 billion over fourteen years to be given to the Inuit Trust Fund, in return for Inuit surrender of title to more than 80% of the approximately two million square kilometres claimed by the Inuit as traditionally used and occupied lands.³⁰ The Inuit gain fee simple title to

²³ *Political Accord*, *supra* note 20 at Part 3.

²⁴ *Ibid.*

²⁵ *Ibid.* at Part 4.

²⁶ *Ibid.* at Part 7.

²⁷ *Ibid.* at Part 8.

²⁸ *Ibid.* at Part 9.

²⁹ *Ibid.* at Part 6.

³⁰ David Pelly, "Birth of an Inuit Nation" *Geographical*, April 1994 at 25; Stilborn, *supra* note 21 at 5–6. See *The Agreement*, *supra* note 3.

approximately 350,000 square kilometres,³¹ with subsurface rights included in 36,300 square kilometres of this territory.³² In addition, the Inuit will receive royalty sharing rights to 50% of the first \$2 million of resource royalties received by the federal government per year and 5% of any additional resource royalties received per year.³³

The Agreement also involves many complex joint management provisions. It creates several regulatory tribunals and agencies: The Nunavut Wildlife Management Board (NWMB),³⁴ The Nunavut Impact Review Board (NIRB),³⁵ The Nunavut Planning Commission (NPC),³⁶ The Nunavut Social Development Council (NSDC),³⁷ and the Nunavut Water Board (NWB).³⁸ These agencies will oversee many aspects of life in the Eastern and Central Arctic, including wildlife management, land and water use, and resource development.³⁹ Inuit are given joint representation with Canadian government officials and Northwest Territorial government officials on these boards.

With the establishment of these boards and tribunals, the Inuit will have guaranteed participation in the decision-making bodies with respect to important areas of concern for the Inuit. They will have an opportunity to be heard, review, and influence the decisions which will affect their lives:

These wildlife, land and resource management agencies represent the fullest measure of self-determination and political control over important aspects of their lives which the Inuit were able to accomplish within the claims settlement itself. The great advantage of providing for these agencies through the land claims process is that

³¹ *The Agreement*, *supra* note 3.

³² *Ibid.* at Art. 19.2.1. Subsurface rights have not been included in other settlements. See Kevin R. Gray, "The Nunavut Land Claims Agreement and the Future of the Eastern Arctic: The Uncharted Path to Effective Self-Government" 52 U. of T. Fac. L. Rev. 300–314 at 318.

³³ *The Agreement*, *supra* note 3 at Art. 25.1.1.

³⁴ *Ibid.* at Art. 5.2.1.

³⁵ *Ibid.* at Art. 12.2.1.

³⁶ *Ibid.* at Art. 11.4.1.

³⁷ *Ibid.* at Art. 32.3.1.

³⁸ *Ibid.* at Art. 13.2.1.

³⁹ Gray, *supra* note 32 at 302.

they are protected under section 35 of the *Constitution Act, 1982*. As a result, government cannot close or alter these agencies without Inuit approval, although it can unilaterally consolidate them for administrative purposes.⁴⁰

The particular provisions of *The Agreement* which contribute to greater control in Inuit hands and self-determination will be examined in more detail in the section discussing "critical mass of powers."

III. OVERVIEW OF THE NUNAVUT ACT

Pursuant to *The Agreement*⁴¹ and the *Political Accord*,⁴² in 1993, Parliament enacted legislation to create the Territory of Nunavut and a Nunavut government to come into force April 1, 1999.⁴³ The *Nunavut Act* describes the basic structure of the new government and establishes Nunavut's full legislative powers and its core administrative powers. This government will closely resemble the territorial government of the Northwest Territories. This Act also sets out interim provisions to prepare for the 1999 implementation date; these sections came into force December 1993.⁴⁴

The Nunavut Territory will consist of "all that part of Canada north of the sixtieth parallel of north latitude and east of the boundary described in Schedule I that is not within Quebec or Newfoundland"⁴⁵ (the boundary agreed on in the land claims agreement)⁴⁶ "and the islands in Hudson Bay, James Bay and Ungava Bay that are not within Manitoba, Ontario or Quebec."⁴⁷ In substance, this area comprises the eastern portion of what is now the Northwest Territories.

⁴⁰ Dacks, Gurston, *Nunavut: Aboriginal Self-Determination Through Public Government*, (unpublished) at 26. I am grateful to Mr. Dacks and the Royal Commission on Aboriginal Peoples for making this unpublished paper available to me.

⁴¹ *Supra* note 3.

⁴² *Supra* note 20.

⁴³ *Nunavut Act*, *supra* note 4.

⁴⁴ *Ibid.* at Part III, ss.53-69 and Part IV, ss. 70-76.

⁴⁵ *Ibid.* at Part I, s.3(a).

⁴⁶ *The Agreement*, *supra* note 3 at Art. 3.

⁴⁷ *Nunavut Act*, *supra* note 4 at s.3(b).

The Nunavut Act also establishes the Nunavut Implementation Commission⁴⁸ [hereinafter the NIC], which is to make decisions regarding the transition and implementation of the Nunavut Territory and its government. The role of the NIC will be discussed later in the section regarding implementation.

The creation of the Nunavut government proposes a new government sensitive to Inuit culture, traditions, social problems, and concerns, but open to all people in the region. Nunavut government is to be a public government, as opposed to an ethnic government. With a public government system everyone residing in the particular geographic area, the Nunavut region, is under the jurisdiction of that government.⁴⁹ With an ethnic government system membership or citizenship is determined by some sort of ethnic criteria.⁵⁰ The Inuit of the Nunavut region have expressed their preference for a public government:⁵¹ "Public government does not deviate from self-government principles as much as it contributes towards the establishment of a working relationship with government involving active Inuit participation."⁵² Despite criticisms that public government is not self-government, in Nunavut it is possible for public government to encompass all the elements necessary for the implementation of self-determination.

Measured against the basic criteria for [A]boriginal self-government, the Nunavut proposal is sound. It defines the territory to be governed, is based on a system of government familiar to Canadians and compatible with Canadian political tradition, provides Inuit with reasonable access to the resources of their territory, lays down requirements for financing and economic development, and proposes a suitable legal and administrative regime for protecting Inuit language and customs.⁵³

⁴⁸ *Ibid.* at Part III, ss.53-69.

⁴⁹ Hawkes, David C., *Aboriginal Self-Government: What Does It Mean?*, (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985) at 27.

⁵⁰ *Ibid.*

⁵¹ *Toward Reconciliation*, *supra* note 15 at 10. See *Building Nunavut*, *supra* note 5.

⁵² Gray, *supra* note 32 at 309.

⁵³ Inuit Committee on National Issues, *supra* note 8 at 39.

The scope of this public government is to be the territory of Nunavut, making it a regional public government.

For regional public government to be a viable model for [A]boriginal peoples, a large territory with a substantial [A]boriginal population is a basic requirement. *Since by definition, participation in a public government is not based upon any ethnic criteria, aboriginal self-government of this variety would be feasible for [A]boriginal peoples only where they constitute a majority, or at least a significant component of the population.*⁵⁴ (emphasis added)

The Inuit comprise an overwhelming majority of the population in Nunavut. Approximately 17,000 of the 22,000 residents are Inuit,⁵⁵ making regional public government a viable self-government regime in Nunavut.

Despite being public government, Nunavut is considering a strict residency criteria for participation in government in order to safeguard Inuit control in this public government. This is a necessary requirement to counteract the significant number of people from the South who come to the North for short periods of time, usually for employment.

The particular provisions contained in the *Nunavut Act* and their contribution to "self-government" in Nunavut will be critically examined in the next section.

IV. MINIMUM CRITICAL MASS OF POWERS?

Self-government is the cornerstone of Inuit policy goals in the Nunavut region. "While self-government is a crucial goal, the idea is intricately linked with other goals; land claim settlements, cultural preservation, and economic development."⁵⁶ Self-government embodies many different elements over which the Inuit desire control. Each element contributes to the whole scheme of self-government and each is necessary for the Nunavut government to be a successful model of self-government. In

⁵⁴ Hawkes, *supra* note 49 at 42.

⁵⁵ Pelly, *supra* note 30 at 25.

⁵⁶ Dickerson, Mark O., *Whose North: Political Change, Political Development, and Self-Government in the Northwest Territories*, (Vancouver: UBC Press and Arctic Institute of North America, 1992) at 169.

Building Nunavut, the Nunavut Constitutional Forum articulated this concept as follows:

there is clearly a minimum 'critical mass' of powers below which Nunavut is no more than a legal fiction. . . . It is essential that the government and people of Nunavut acquire enough powers and responsibilities through the various forms of agreement, devolved authorities, administrative delegations, etc. that political participation for Nunavut residents is meaningful and not simply a public relations deception.⁵⁷

Nunavut, then, must acquire this "critical mass of powers" to ensure successful and meaningful self-government. Without these powers this new public regime is not truly self-government.

This section examines six key areas⁵⁸ to determine if Nunavut has acquired this "minimum critical mass of powers." Some of the more important sections of the *Nunavut Act* and *The Agreement* will be looked at in detail, with a view to determining what provisions contribute to self-government and what ones detract from real self-government for Nunavut.

1. Land and Natural Resources

As discussed earlier, land is intricately interwoven with the Inuit desire for self-government.

Land has been the very reason that peoples in the region have been able to survive over thousands of years They developed living patterns as well as religion, a technology, and a governing system which enabled them to survive in one of the harshest environments in the world. The land was key to this survival, because it was from the land that they derived their food, clothing, and shelter. . . . Clarifying land holdings in the Northwest Territories, then, is an essential factor in determining their future survival in the region.⁵⁹

⁵⁷ *Building Nunavut*, *supra* note 5 at 12.

⁵⁸ The key areas are developed from those which have been identified by the Inuit as important in acquiring the powers necessary to make Nunavut truly self-governing (the critical mass of powers). See *Ibid.*

⁵⁹ Dickerson, *supra* note 56 at 170.

The Nunavut government does not have jurisdiction over lands and resources in the *Nunavut Act*.⁶⁰ It is hoped that this legislative jurisdiction will eventually be devolved to the Nunavut government. "This will strengthen the ability. . . which the land claim *Agreement* gives them to manage the environment in their best interest."⁶¹ Under *The Agreement*, the Inuit have obtained legal fee simple title to 20% of Nunavut's land mass.⁶² These lands are alienable in fee simple only to the Territorial or federal government or to Nunavut municipalities.⁶³ This restriction on alienation of title is presumably to prevent the loss of Inuit lands to other parties, thus dwindling the land base. The Inuit are still entitled to lease, license or grant some lesser interest in the Inuit Owned Lands.⁶⁴ The Inuit also have subsurface rights to 36,000 square kilometres of these lands,⁶⁵ and the Nunavut government will be entitled to beneficial use and enjoyment of Crown lands.⁶⁶

In addition to land ownership, rights to harvest from the land are important to Inuit people as many Inuit people still pursue a fairly traditional way of life, the focal point of which is hunting, fishing, and trapping. "It is when 'on the land,' as they say, that the garage mechanic in Gjoa Haven becomes a real person."⁶⁷ In this way, harvesting rights are not just a right to use the land, but also contribute to the cultural preservation of the Inuit way of life. "The agreement provides for free and unrestricted Inuit harvesting rights on the remaining Crown lands, park lands, water, and marine areas in Nunavut."⁶⁸

As well as having ownership rights, the Inuit have some control over lands, resources and wildlife through the administrative boards established under the *Nunavut Agreement*. Access to Inuit land or subsurface materials must be approved by the Designated Inuit

⁶⁰ This is the same as the Territorial Government of the Northwest Territories.

⁶¹ Dacks, *supra* note 40 at 68.

⁶² *The Agreement*, *supra* note 3 at Art. 19.2.1.

⁶³ Gray, *supra*, note 32 at 318-319. *Ibid.* at Arts. 19.7.1, 19.7.2.

⁶⁴ *The Agreement*, *supra* note 3 at Art. 19.7.3.

⁶⁵ *Ibid.*

⁶⁶ *Nunavut Act*, *supra* note 4 at ss. 49, 23(1)(i).

⁶⁷ Pelly, *supra* note 30.

⁶⁸ Gray, *supra* note 32 at 319. See *The Agreement*, *supra* note 3 at Arts. 5.7.16 & 5.7.17.

Organization.⁶⁹ Furthermore, the Inuit must be consulted before petroleum exploration can take place on Crown and Inuit lands in the settlement area.⁷⁰

Inuit will have joint participation on The Nunavut Wildlife Management Board (NWMB).⁷¹ The board must adhere to the harvesting interest of the Inuit and the need for a healthy renewable resource economy in every decision. It is obliged to recognize the importance of effective Inuit representation in wildlife management.⁷² Inuit harvesting, economic and environmental interests will also be given a voice on the Nunavut Impact Review Board (NIRB) which will review public and private proposals for development.⁷³ "As projects proceed, the government, the Nunavut Planning Commission (NPC), and possibly the NIRB will be required to ensure that the conditions of a project approval are being met."⁷⁴

The Nunavut government will have the power to oversee the decisions from these agencies. When an agency makes a decision which is within the Nunavut government's jurisdiction of powers, the Nunavut Minister can review, reject, modify, or accept it.⁷⁵ As an elected official this Minister will likely be more sensitive to Inuit concerns and needs. This adds an extra safeguard to Inuit environmental, economic, and resource interests.⁷⁶ Of course, if the decision is within a federal jurisdiction the federal Minister has the reviewing power.⁷⁷

Self-government cannot exist without lands and resources being vested in the Inuit people. The Inuit do have the land base which is necessary for the implementation of self-government. They have participation in the decisions made regarding lands, resources, and the environment. Furthermore, Nunavut can benefit economically

⁶⁹ Gray, *supra*, note 32 at 330. *The Agreement*, *supra* note 3 at Art. 21.2.1.

⁷⁰ *The Agreement*, *supra* note 3 at Art. 27.1.1.

⁷¹ *Ibid.* at Art. 5.2.1.

⁷² Gray, *supra*, note 32 at 331–332. *Ibid.* at Art. 5.1.6.

⁷³ *The Agreement*, *supra* note 3 at Art. 12.2.1. One of the primary functions of the NIRB is to review the environmental and socio-economic impacts of project proposals.

⁷⁴ Gray, *supra* note 32 at 332; *Ibid.* at Arts. 12.7.1, 12.7.6.

⁷⁵ Dacks, *supra* note 40 at 28.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

and culturally from ownership and regulatory participation with respect to these lands and resources. The contribution to cultural preservation and economic development will be discussed below under their respective headings.

2. Education

"Education is one of the 'engines' of any self-government arrangement."⁷⁸ Education, in terms of having trained workers, is very important to the success of the Nunavut government and in alleviating the social ills prevalent in Nunavut. Currently, only 15% of Inuit complete high school.⁷⁹ This state of Inuit education may exist as a consequence of the fact that the Inuit have not been able to control the way their education system functions. Moreover, many Inuit people have seen no reason to be further educated because of a sense of despair and lack of hope in obtaining employment. With Inuit in control of their own education system,⁸⁰ these difficulties may be ameliorated in the future. For these reasons, it is vital that the Inuit gain authority over education.

The lack of skilled Inuit to take on positions within the government and public service of Nunavut is causing great concern for the success of self-government in Nunavut.⁸¹

The education system, in the Northwest Territories, although only in existence since the 1960's, has not yet produced graduates with the required skills that are needed in a functioning government. Skills such as

⁷⁸ Cowie, Ian B., 1987, *Future Issues of Jurisdiction and Coordination Between Aboriginal and Non-Aboriginal Government* (Kingston, Ontario: Institute of Intergovernmental Relations, Queen's University) at 54.

⁷⁹ Pelly, *supra* note 30. From my experience in the North I know that until the summer of 1994 all students from the N.W.T. had to travel to Yellowknife in order to attend high school, leaving behind their families and friends at a young age. Given these circumstances it is not surprising that many people decided not to go to high school or had great difficulty completing high school. Recently, the G.N.W.T. has built new high schools so that high-school age children can obtain their diplomas in their community or in a community much closer than Yellowknife. The practice of bringing higher education closer to the communities is likely to continue under Nunavut government.

⁸⁰ *Nunavut Act*, *supra* note 4 at s.23(1)(m).

⁸¹ G.N.W.T. Legislative Assembly, *Report on Impact of Division of the Northwest Territories*, (N.W.T. Legislative Assembly Special Committee on the Impact of Division, November 1981) at 78 [hereinafter *Report on Impact*].

managers, data processing specialists, engineers and technicians, financial experts or economists have not been graduated to a sufficient degree by the education system. Without such skills a government simply cannot function and deliver the services to the people.⁸²

If outsiders take on the positions of power within Nunavut, then once again the control of government will be out of Inuit hands. The Keewatin Inuit Association has suggested the establishment of term positions of one or two years for southern Canadians to come to Nunavut, to train Inuit. After training, the Inuit could take responsible positions within the government of Nunavut. "The ultimate objectives of the trainers would be to train these Inuit people to take over senior management positions."⁸³

In the time before a new generation of Nunavut-educated people are produced, the government of Nunavut faces a very difficult problem. This is one of the reasons for a five year period of transition time before implementation. Part 9 of the *Political Accord* dealing with training and human resource planning states that the parties recognize the central importance of training⁸⁴ and specifies that "training plans shall be incorporated into all planning, design and implementation activities of the NIC."⁸⁵

Under paragraph 23(1)(m) the Nunavut legislature can pass laws in relation to education.⁸⁶ This means that they will have the ability to tailor the Nunavut education system to combat the problems with low educational attainment in the region.⁸⁷ The Nunavut government will have the power to incorporate Inuit traditions and culture into the curriculum of Nunavut schools. As well, Nunavut legislation can implement new training programs that will create a skilled workforce capable of accepting responsible positions with the Nunavut government, public service and throughout Nunavut in other capacities.

Despite having autonomous powers to legislate with regard to education, the reality is that training programs will require

⁸² *Ibid.* at 79.

⁸³ *Aboriginal Self-Government and Constitutional Reform*, *supra* note 7 at 95.

⁸⁴ *Political Accord*, *supra* note 20 at Part 9.1.

⁸⁵ *Ibid.* at Part 9.2.

⁸⁶ *Nunavut Act*, *supra* note 4 at s. 23(1)(m).

⁸⁷ Pelly, *supra* note 30.

significant funding. Since Nunavut, at least in its transitional years, will receive most of its funding from the federal government, the degree to which the Nunavut legislature will be able to legislate expansive training programs is likely to be determined by the availability of funds. Education should be given extremely high priority in regard to government expenditures, both prior to implementation and afterwards, because without increased training of Inuit people, the Inuit will not be able to fill the positions of their own government.

In the years leading up to implementation of the Nunavut government, the NIC will be responsible for recommending the amount of money to be expended for training and the types of programs which should be created, although the federal government is not bound by these recommendations. The federal government's commitment and ability to fund these training programs will have a crucial impact on the viability of self-government in Nunavut. It should be encouraged to honour its stated commitment to Inuit training programs.

There is a need for training, not only in skills familiar to southern non-aboriginal culture, but also training in the skills necessary to preserve and develop Inuit culture.⁸⁸ "...[T]he principles underlying the existing programmes financed by the federal government need to be adjusted, because, by and large, those programmes don't serve that goal."⁸⁹ Federal money is already being spent on training in the Nunavut region; that money should be used to further the goals of Inuit in training people for self-government.

While not directed at problems with respect to training for self-government, the programs established under *The Agreement* will likely have a positive ancillary effect in meeting the training needs of the Nunavut government. *The Agreement* provides for federal funding of Implementation Training programs.⁹⁰ *The Agreement* creates a Nunavut Implementation Training Committee (NITC) which will consist of seven appointed members, five of which will be

⁸⁸ *Aboriginal Self-Government and Constitutional Reform*, *supra* note 7 at 94.

⁸⁹ *Ibid.*

⁹⁰ *The Agreement*, *supra* note 3 at Art. 37. Funding is in the amount of \$13,000,000.

appointed by TFN and four other Designated Inuit Organizations.⁹¹ This committee will undertake a study to identify the positions likely to be required to implement *The Agreement*, to identify the necessary skills and qualifications required for these positions, and to identify implementation training requirements for Inuit respecting these positions in the short and long-term.⁹² Upon completion of this Training Study the NITC will develop an Implementation Training Plan to address the training requirements identified in the Study.⁹³ The Training Plan will identify existing government training programs which meet Inuit implementation training requirements and new training initiatives to be funded by the Implementation Training Fund.⁹⁴

Although the Training Study and the Training Plan set out in *The Agreement* only relate to implementation of *The Agreement* and not the implementation of Nunavut's government, Article 9.4 of the *Political Accord* allows for coordination between the training efforts for implementation of *The Agreement* and the creation of Nunavut. If these programs are successful there could indeed be a positive effect in that more Inuit would be trained to accept responsible positions within the Nunavut government and its administration.

3. Culture/Language

The Inuit have distinct traditions and a culture which is different from that of the dominant Canadian culture. "Many desire to live in a bi-cultural existence, with one foot in a traditional culture and one foot in the modern culture."⁹⁵ Culture is at the heart of any society and it must be preserved and continued. Therefore, as a self-governing entity, Nunavut must be vested with jurisdiction to make decisions with respect to culture, language, and cultural preservation.

Having a government that is intrinsically attuned to Inuit needs, traditions, and cultural values will promote cultural development and preservation in itself, not only with respect to traditional

⁹¹ *Ibid.* at Art. 37.5.1.

⁹² *Ibid.* at Arts. 37.6.1. –6.5.

⁹³ *Ibid.* at Art. 37.7.1.

⁹⁴ *Ibid.* at Art. 37.7.2.

⁹⁵ Dickerson, *supra* note 56.

lifestyles, but also in protecting cultural property. Similarly, an Inuit-run education system will inevitably incorporate cultural values and language into the curriculum.

The Inuit language reflects the world view and culture of the People. Paragraph 23(1)(n) of the *Nunavut Act* states that the Nunavut legislature has authority to pass laws for the "preservation, use and promotion of the Inuktitut language"⁹⁶ (the Inuit language). The *Official Languages Act*⁹⁷ of the Northwest Territories will continue in force in Nunavut by section 29 and can not be "amended, repealed or otherwise rendered inoperable by the Legislature without the concurrence of Parliament by way of a resolution."⁹⁸ This, in turn, should help to preserve the Inuit culture.

The Agreement provides for the Impact Review Board to take into account the effects of development on Inuit culture.⁹⁹ While control over decisions is not exclusively in Inuit hands, they will have equal participation on this board and thus will have an administrative tool for protecting Inuit culture.

Some specific provisions in the *Nunavut Act* and *The Agreement* provide for the continuation of the Inuit culture. For example, *The Agreement* allows each Inuk to remove 50 cubic yards of carving stone per year,¹⁰⁰ which recognizes Inuit interests for cultural art in this unique stone. The *Nunavut Act* also allows Inuit unrestricted rights to hunt, trap, fish on Crown lands, parks, and marine areas.¹⁰¹ Coupled with the fact that the Nunavut legislature cannot legislate so to restrict this right,¹⁰² this will ensure that the Inuit will be able to continue their traditional way of life, which remains deeply rooted in harvesting from the land and waters.

⁹⁶ *Nunavut Act*, *supra* note 4 at s.23(1)(n).

⁹⁷ R.S.N.W.T. 1988, c. O-1. This Act recognizes, in law, Aboriginal languages, including Inuktitut as Official Languages of the NWT. The preamble states that the GNWT is committed to the preservation, development and enhancement of Aboriginal languages and states the hope that the legal protection of languages will assist in preserving the culture of the People as expressed through their language. Section 18 of this Act allows anyone whose rights under the Act have been denied or infringed to apply to the courts for an appropriate remedy.

⁹⁸ *Nunavut Act*, *supra* note 4 at Part II., s.38.

⁹⁹ *The Agreement*, *supra* note 3 at Art. 12.

¹⁰⁰ *Ibid.* at Art. 19.9.4.

¹⁰¹ *Ibid.* at Arts. 5.7.16, 5.7.17.

¹⁰² *Nunavut Act*, *supra* note 4 at s. 24.

"Any developer who encroaches on Inuit subsistence hunting rights is liable for any loss sustained."¹⁰³ Claims that there has been an infringement of harvesting rights are heard before an Arbitration Board, which substitutes for the courts.¹⁰⁴ Members of the Board are those agreed upon by the federal government, the Northwest Territorial government, and the Designated Inuit Organization.¹⁰⁵ "This process moves the question of Inuit cultural integrity into an arena where their interests are understood."¹⁰⁶

The Inuit hope that, with Nunavut, they will be able to forge international relationships with Aboriginal Peoples in other countries. They could have participatory involvement, through the Canadian government, in international affairs which affect them.

The Government of Nunavut should be designed to foster these relations, as the Government of the NWT has done, and to work with the Government of Canada and with Aboriginal non-governmental organizations such as the Inuit Circumpolar Council to pursue territorial goals, to influence the shape of Canada's policies concerning the Arctic and to contribute to the attainment of international objectives. . . .¹⁰⁷

This would help to promote their unique culture on an international level and help to develop their culture by sharing experiences with Aboriginal Peoples in other lands.

Archaeological evidence is important to the preservation of Inuit culture. Under *The Agreement*, Article 33 specifies that archaeological evidence found in the Nunavut Settlement Area is a record of Inuit use and occupancy of lands and resources through time, representing a cultural, historical, and ethnographic heritage of Inuit society, and recognizes that Inuit have a special relationship with such evidence.¹⁰⁸ Recognizing the spiritual, educational, cultural, and religious importance of the archaeological record to Inuit in the Nunavut Settlement Area, Article 33.2.2. states that Inuit involvement in identifying, protecting, and conserving these

¹⁰³ Gray, *supra* note 32 at 319. See *The Agreement*, *supra* note 3 at Art. 6.

¹⁰⁴ *The Agreement*, *supra* note 3 at Art. 5.7.19.

¹⁰⁵ *Ibid.* at Art. 38.1.3.

¹⁰⁶ Gray, *supra* note 32 at 320.

¹⁰⁷ Dacks, *supra* note 40 at 60.

¹⁰⁸ *The Agreement*, *supra* note 3 at Art.33.2.1.

sites and specimens is both desirable and necessary.¹⁰⁹ It calls for the Inuit, the Government of the Northwest Territories, and the Government of Canada to share responsibilities for management and conservation. An Inuit Heritage Trust is established under Article 33.4.1.¹¹⁰ which is invited to participate in developing government policy and legislation on archaeology in Nunavut¹¹¹ and will assume increasing responsibilities for supporting, encouraging, and facilitating the conservation, maintenance, restoration, and display of archaeological sites and specimens.¹¹²

Archaeological specimens found in the Nunavut Settlement Area are jointly owned by the federal government and the Inuit Heritage Trust.¹¹³ The Inuit Heritage Trust can request a loan of artifacts originating in or relating to Nunavut which are in the possession of federal or Territorial agencies and museums.¹¹⁴ This derogates from Nunavut's self-governing powers in that they can not exclusively own and manage their own archaeological specimens.

The *Nunavut Act* authorizes the Governor-in-Council to make regulations for the protection, care and preservation of cultural, ethnological, and archaeological sites and specimens.¹¹⁵ Anyone who contravenes these regulations is guilty of a summary conviction offence.¹¹⁶ Notably, the Governor-in-Council has the power to implement these regulations; there is no express provision for vesting a similar power in the Nunavut government. This is a significant defect in Nunavut's legislative jurisdiction over cultural preservation.

Specimens, objects, or documents can be seized by peace officers if it is believed that they have been dealt with in contravention of regulations.¹¹⁷ Seizures are reported to a justice of the peace. If satisfied that the object, specimen, or document has been dealt with in contravention of the regulations, the justice of

¹⁰⁹ *Ibid.* at Art. 33.2.2.

¹¹⁰ *Ibid.* at Art. 33.4.1.

¹¹¹ *Ibid.* at Art. 33.3.1.

¹¹² *Ibid.* at Art. 33.4.3.

¹¹³ *Ibid.* at Art. 33.7.1.

¹¹⁴ *Ibid.* at Arts. 34.3.2., 33.8.2.

¹¹⁵ *Nunavut Act*, *supra* note 4 at s. 51(1).

¹¹⁶ *Ibid.* at s.51(2).

¹¹⁷ *Ibid.* at s.52(1).

the peace will declare the object, specimen, or document to be forfeited to the Crown.¹¹⁸ An obvious question arises—why must these specimens be forfeited to the Crown and not to the Nunavut government? As a self-determining institution, the Nunavut government should be given the jurisdiction over these specimens, objects, and documents since retaining these items in Nunavut is of particular concern for preserving Inuit culture.

Under both *The Agreement* and the *Nunavut Act*, Inuit people are being required to share jurisdiction over their own cultural artifacts with the Canadian government. Cultural preservation within its boundaries is a subject area over which a self-governing entity should have exclusive authority. Unfortunately, this element of self-government has not been fully realized in Nunavut.

4. Social Policy and Health

Social policy “will be central to effective self-governing capacities encompassing such areas as community care, recreation, housing, and income support.”¹¹⁹ Social development is so broad an issue that it is not to be found under one specific section of the Act, but rather involves the powers of the Nunavut government to legislate in a number of areas, such as hospitals, issues of a private and local nature, education, and the importation of intoxicants into Nunavut. The entire Nunavut proposal can be seen as a social policy instrument since it will affect almost every facet of Inuit life.

Social development is intricately linked with other areas, such as health:

The medical staff of the federal government, over many years of observation and close attention to the needs of individuals in Nunavut, concluded that social problems were largely the root of health problems, and that the root of social problems was the powerlessness of the people.¹²⁰

The *Nunavut Act* gives the Nunavut Legislative Assembly jurisdiction to legislate for hospitals, but not general health. Health is a complex area due to practical difficulties associated with the

¹¹⁸ *Ibid.* at s.52(2).

¹¹⁹ Cowie, *supra* note 78 at 55.

¹²⁰ *Building Nunavut*, *supra* note 5 at 36.

lack of a health care program infrastructure and higher utilization rates and per capita costs for Inuit peoples.¹²¹ The Nunavut government has not been given jurisdiction to legislate in general health matters. Given its link with social problems, this is a significant weakness in Nunavut's legislative powers. It will impede the government's ability to legislate new health care structures which take Inuit concerns and culture into account, such as increased preventive care facilities or midwifery arrangements. However, in a more general sense, the Nunavut government will give more power to the Inuit as a people and may ameliorate the sense of powerlessness which is said to be the root of both social problems and health problems.

The Inuit are particularly concerned with industrial development adversely affecting their social development:

The Inuit residents of the Arctic have been fighting a rearguard action against the adverse impacts of industrialisation and infrastructure development so rapid that it has threatened to upset their whole society. It is important that they have all possible means to deal with such matters.¹²²

Building Nunavut called for the Nunavut government to have all the powers in social policy of any Canadian provincial jurisdiction with special attention on powers in respect of health services, housing, manpower, labour relations, and social services.¹²³ Notably, none of these powers, thought to be so necessary by the Inuit negotiators in the arena of social policy, have been granted to the Nunavut Government. It is contemplated that the Nunavut government will acquire administrative jurisdiction in these areas at a later time, as Nunavut matures, increases its revenue base, and becomes more independent.¹²⁴

In the meantime, the regulatory agencies established under *The Agreement* will have an important role to play with respect to social policy development and in protecting Inuit society from adverse industrialization in the Arctic. Central in this will be the Nunavut Social Development Council which will assist the Inuit in defining

¹²¹ Cowie, *supra* note 78 at 54.

¹²² *Ibid.* at 37.

¹²³ *Ibid.*

¹²⁴ Dacks, *supra* note 40 at 35.

and promoting their social and cultural development goals and objectives.¹²⁵ It will encourage the government to design and implement social and cultural development policies and programs that address Inuit interests. The establishment of this Council recognizes that the Inuit have a right, within the Nunavut Settlement Area, to participate in the development of social and cultural policies, and in the design of social and cultural programs and services, including their method of delivery.¹²⁶

While *The Agreement* recognizes the Inuit right to participate in designing and implementing social policy, the federal government has not granted this jurisdiction outright in the *Nunavut Act*. The fact that legislative jurisdiction with respect to these important areas of social development remains in the hands of the federal government, strikes a blow to Nunavut's ability to be truly self-governing. Social policy is an essential power which a self-governing institution must have in order to remedy social ills and to create a better social future for its people.

5. Justice

The *Nunavut Act* establishes the Supreme Court of Nunavut and the Court of Appeal of Nunavut.¹²⁷ Judges of superior courts in Nunavut will be appointed by the Governor in Council.¹²⁸ This is also done in the provinces. The judges of the Supreme Courts in the Yukon and the Northwest Territories will be judges of the Supreme Court of Nunavut.¹²⁹

The Nunavut legislature will have powers to pass laws for the administration of justice in Nunavut, including the constitution, maintenance and organization of territorial courts, and the procedures in civil matters in those courts.¹³⁰ It can also pass laws for the establishment, maintenance, and management of prisons or lock-ups in Nunavut.¹³¹ Since the federal government retains its criminal law power, the Nunavut government will not have

¹²⁵ *The Agreement*, *supra* note 3 at Art. 32.3.3.

¹²⁶ *Ibid.* at Art. 32.1.1.

¹²⁷ *Nunavut Act*, *supra* note 4 at ss. 31–36.

¹²⁸ *Ibid.* at s. 31(2).

¹²⁹ *Ibid.* at s.32.

¹³⁰ *Ibid.* at s.23(1)(e).

¹³¹ *Ibid.* at s.23(1)(f).

jurisdiction to legislate its own criminal laws. Thus, Nunavut's self-governing powers are tempered by its inability to recognize traditional laws if that were determined by the Inuit to be desirable. This represents a compromise necessary in the Canadian federal system. Nunavut's jurisdiction with respect to criminal justice is no more restricted than that of the provinces. The jurisdiction to legislate for the administration of justice, both civil and criminal, will provide the Nunavut government with a means of establishing structures and programs which take Inuit concerns, values, and traditions into account, such as diversion programs, healing circles, sentencing circles, and dispute resolution mechanisms.

6. Economic Development

The standard of living of the Inuit, like most Aboriginal Peoples, is far below the average for most Canadians.¹³² Economic development in Nunavut can help to rectify this, and it is for this reason that economic development is an essential element of self-government.

Economic development, however, is itself part of the cultural dilemma facing Native people. As they opt for a higher standard of living, it may be more difficult to preserve traditional cultural values. Economic development, then, may clash with the goal of cultural preservation. Most Native people now feel that rectifying economic development will have to come from within their communities. Native people must assume responsibilities for economic development. This means they must have the power locally to influence and control the process of economic development.¹³³

"As with education, this is one of the main engines of effective self-government."¹³⁴ It is clear that Nunavut must work to develop its economy so that it can become more self-sufficient and less dependent on the federal government, yet do so in a way which does not derogate from Inuit cultural preservation and social development goals.

¹³² Dickerson, *supra* note 56.

¹³³ *Ibid.*

¹³⁴ Cowie, *supra* note 78 at 56.

As the Inuit have legal title to lands and some subsurface and water rights, they should be able to develop these to produce revenues for the government. When selecting the lands to which they would hold subsurface rights, the Inuit wisely selected those lands which represent 80% of Nunavut's known mineral reserves.¹³⁵ Inuit also gain royalties to federal resource revenues in the amount of 50% of the first \$2 million received by the federal government per year and 5% of additional resource royalties received.¹³⁶ *The Agreement* will also contribute to economic development in that the Inuit will be given preference with respect to government bidding contracts.¹³⁷

The government of Nunavut has jurisdiction over economic development in that it has the power to make expenditures for territorial purposes.¹³⁸ The Legislative Assembly of Nunavut also has the power to tax,¹³⁹ and to license in order to raise revenue for territorial, municipal or local purposes.¹⁴⁰ These funds will contribute to economic growth in Nunavut. However, the Nunavut legislature can not borrow money under a law of the legislature unless first approved by the Governor in Council.¹⁴¹ This may present a serious restriction on Nunavut's ability to obtain further funds for economic development.

The above criteria represent the critical mass concept—the areas over which it is essential that the Inuit have power and control in order to successfully implement a government that can be considered autonomous enough to be self-government. The Inuit have obtained authority to legislate in most of these subject areas. Furthermore, there is a broad provision in the *Nunavut Act* for the Nunavut legislature to pass laws for, and in respect of, Indians and Inuit¹⁴² and to legislate in all matters of a merely local or private nature.¹⁴³ These sections encompass broad powers which the Legislature may be able to rely on to legislate in areas not expressly

¹³⁵ Pelly, *supra* note 30.

¹³⁶ *The Agreement*, *supra* note 3 at Art. 25.1.1.

¹³⁷ *Ibid.* at Arts. 23, 24.

¹³⁸ *Nunavut Act*, *supra* note 4 at s. 23(1)(u).

¹³⁹ *Ibid.* at s. 23(1)(j).

¹⁴⁰ *Ibid.* at s. 23(1)(k).

¹⁴¹ *Ibid.* at s. 27(2).

¹⁴² *Ibid.* at s. 23(3).

¹⁴³ *Ibid.* at s. 23(1)(v).

provided for in the *Nunavut Act*. The Inuit will have authority in a number of subject areas through their new government as well as input on administrative boards created under *The Agreement*. Despite some weaknesses, overall, the scope and extent of legislative powers in Nunavut leads to the conclusion that the Inuit have acquired the minimum critical mass of powers necessary to be self-governing.

Despite having attained jurisdiction over these critical powers, autonomy will also be an essential factor in self-government in Nunavut. Lack of autonomy could hinder the development of the Nunavut government. Specifically, the role of the federal government could prevent this otherwise viable Inuit self-governing model from evolving into a truly self-governing institution. The next section of this paper will discuss the restrictions on Nunavut's autonomy.

V. AUTONOMY

A number of provisions within the Act create concerns that Inuit self-government could be put in jeopardy at the hands of the federal government. For example, the Commissioner, on behalf of Nunavut, may not borrow money under a law of the Nunavut legislature without approval from the Governor in Council.¹⁴⁴ This is a restriction on the autonomy of the Nunavut government to obtain further funds for the functioning of government, implementation of programs, and other matters such as economic development.

While *The Agreement* is afforded Constitutional protection under section 35 of the *Constitution Act, 1982*, as a modern treaty¹⁴⁵ and its provisions are not subject to unilateral amendment or revocation by the federal government, the creation of the new Nunavut territory and the Nunavut government is outside of the land claims agreement. Article 4 of *The Agreement* states that neither the *Political Accord* nor the legislation are to be accorded any Constitutional protection under section 35, a compromise forced on the Inuit during negotiations of *The Agreement*.

¹⁴⁴ *Ibid.* at s. 27(2).

¹⁴⁵ *Nunavut Land Claims Agreement Act*, *supra* note 3, Preamble. See also *The Agreement*, *supra* note 3 at Art. 2.2.1.

Notably, the *Nunavut Act* contains a crucial over-ride clause which significantly calls into question the independence of the Legislature to make laws. Section 28 states that every law made by the Legislature must be transmitted to the Governor in Council within thirty days after its enactment and that "the Governor in Council may disallow any law made by the Legislature or any provision of any such law at any time within one year after its enactment."¹⁴⁶ This sounds somewhat similar to the provisions in the *Indian Act* which allow the federal government to over-ride band laws.¹⁴⁷ The federal government will have broad jurisdiction to nullify any of Nunavut's laws. There is the potential for federal intrusion to seriously undermine self-government. However, whether the federal government will exercise this power is quite questionable. It should be remembered that the Government of Canada retains the legal authority to disallow even provincial legislation,¹⁴⁸ but by convention, it has fallen into disuse since 1943. The federal government should resist any temptation to over-ride Nunavut's legislation. Only in this way can Nunavut fully exercise its powers of self-government.

Nunavut legislative powers are "subject to any other Act of Parliament,"¹⁴⁹ therefore maintaining federal paramountcy. This is not an unusual limitation on governing powers in the Canadian federal system. Under the Constitution, if the federal government makes laws which intrude on the provinces' powers, that legislation could be challenged in court as *ultra vires* the federal jurisdiction. Nunavut's legislative powers do not have constitutional status. Therefore, any interference by the federal government can not be challenged.

As a delegated authority, the Nunavut Territorial government only derives those powers which the federal government chooses to delegate to it. The federal government retains the ultimate authority to rescind the delegation or to alter the powers, although it is unlikely to do so without Inuit consent. Obviously, the fact that the Nunavut government is a delegated form of authority puts

¹⁴⁶ *Nunavut Act*, *supra* note 4 at s.28.

¹⁴⁷ *Indian Act*, R.S.C. 1985, c. I-5 at ss. 82, 83(1)–83(3) as am. by R.S.C., 1985, c.17 (4th Supp.), s.10.

¹⁴⁸ *Constitution Act, 1867*, s. 90.

¹⁴⁹ *Nunavut Act*, *supra* note 4 at s. 23(1).

severe restrictions on its ability to legislate autonomously. Can a delegated subordinate government be considered true self-government? This remains to be seen in Nunavut. The degree to which Nunavut is able to function as a self-governing entity will depend largely on the federal government's approach to Nunavut and the degree to which it interferes with Nunavut's autonomy.¹⁵⁰

Some would argue that the very fact that the Nunavut government is subordinate to and subject to federal action, detracts from true self-government in Nunavut.¹⁵¹ The other options available would be (1) provincial status for Nunavut, and/or (2) constitutional entrenchment of self-government.

The first option, although perhaps a future goal for Nunavut, is not an easy alternative to pursue. Two barriers exist in gaining provincial status at this time. First, the provinces would be required to approve Nunavut's admission as a province.¹⁵² The infancy of Nunavut's government creates the second barrier. Nunavut will need time to mature and create a viable revenue base before attempting to gain provincial status.¹⁵³ Until such time as provincehood is feasible, Nunavut will continue to be a delegated form of government with its inherent disadvantages. This is a practical compromise which serves the purpose of bringing government closer to the people of Nunavut.

The second option, constitutional entrenchment of self-government, would give self-government in Nunavut security and acknowledge the long-held Aboriginal principle that self-government is inherent and does not come from the Crown or any other government. The Inuit of Nunavut have not abandoned this goal; however, for political reasons it is not currently attainable.

¹⁵⁰ In recent years the Federal Government has been delegating more authority and devolving more powers to the Government of the Northwest Territories; hopefully the Canadian Government will take the same approach with Nunavut.

¹⁵¹ See T. Isaac, "The Nunavut Agreement in Principle" (1992) 21 Man. L.J. 390 at 398-99.

¹⁵² *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982*, (U.K.) 1982, c.11.

¹⁵³ See comments by Gordon Robertson in *Aboriginal Self-Government and Constitutional Reform*, *supra* note 7 at 79-80. For more discussion see Gordon Robertson, *Northern Provinces: A Mistaken Goal*, (Montreal: Institute for Research on Public Policy, 1985).

There is nothing in either the *Nunavut Act*, *The Agreement*, or the *Political Accord* which guarantees that the government in Nunavut must be self-government. Self-government only comes out of the fact that the Inuit are a majority of the population in Nunavut, thereby securing electoral control over the Legislative Assembly. This is why the Inuit of Nunavut still call for the constitutional entrenchment of self-government.¹⁵⁴

For the meantime, it seems that the creation and implementation of a territorial government in Nunavut is an acceptable compromise for the Inuit. In fact, it may be too harsh to call it a compromise, because it is heralded as the dawn of a new era for the Inuit. The Inuit of Nunavut have chosen what appears to be a very practical avenue for the implementation of their rights. This avenue departs from a purely rights-based argument for self-government, although not at all denouncing it, and puts self-government into practice for the Inuit in Nunavut.

Putting self-government into practice, though, requires firm implementation procedures that do not detract from the principles of self-government. This issue will be examined in the following discussion.

VI. IMPLEMENTATION

Implementation is an important factor in obtaining true self-government. It is not enough to have a commitment to create a government, or even to legislate for its creation, without having specific guidelines for its implementation. The James Bay Northern Quebec Agreement¹⁵⁵ is demonstrative of how lack of implementation provisions can lead to the stagnation of self-government. The Inuit have been mindful of this and have created very specific implementation guidelines.

The *Nunavut Act* establishes the NIC, which is set up to deal with transitional issues, and to prepare for the implementation of

¹⁵⁴ Inuit Committee on National Issues, *supra* note 8 at 39.

¹⁵⁵ Canada, *James Bay and Northern Quebec Agreement*, (Quebec: Editeur du Quebec, 1976). See also Gray, *supra* note 32 at 313–316.

the Nunavut Territory and government in 1999.¹⁵⁶ The NIC began its work in January 1994.

The Commission is chaired by a person appointed on the recommendation of the Minister of Indian Affairs and Northern Development with the agreement of the Northwest Territories and the Tunngavik.¹⁵⁷ Notably, the current chairperson is John Amagoalik who was key in Nunavut land claims negotiations, and is sometimes referred to as the "father of Nunavut." In addition to the Chairperson, there are nine members—three selected from a list of candidates supplied by the government leader of the Northwest Territories and three from a list of candidates provided by the Nunavut Tunngavik.¹⁵⁸ At least six of the NIC members are to be residents of Nunavut.¹⁵⁹ While the Inuit are not guaranteed to be a majority on the NIC, this formula significantly enhances the likelihood that the NIC will be sensitivity to Inuit concerns.

The NIC will advise the Tunngavik and the governments of Canada and the Northwest Territories on the establishment of Nunavut. In particular its mandate includes advising on the following: timetables for the Nunavut government to assume responsibility for delivery of services, "the process for the first election" (including the number of Legislative Assembly members and their electoral districts),¹⁶⁰ "the design and funding of training programs,"¹⁶¹ the process for determining the Nunavut capital, "the principles and criteria for the equitable division of assets and liabilities between Nunavut and the Northwest Territories,"¹⁶² the new public works necessary for establishing Nunavut and the construction of those works, "the administrative design of the first Government of Nunavut,"¹⁶³ the arrangements for delivery of programs and services where Nunavut's responsibility for their delivery is to be phased in, and any other matter referred to it by

¹⁵⁶ *Nunavut Act*, *supra* note 4 at s.54. This part is repealed three months after the coming into force of the Nunavut Government, see s.69.

¹⁵⁷ *Ibid.* at s.55(1).

¹⁵⁸ *Ibid.* at s.55.2.

¹⁵⁹ *Ibid.* at s.56.

¹⁶⁰ *Ibid.* at s.58(b).

¹⁶¹ *Ibid.* at s.58(c).

¹⁶² *Ibid.* at s.58(e).

¹⁶³ *Ibid.* at s.58(g).

the Minister with the consent of all parties.¹⁶⁴ The NIC is also responsible for establishing programs to inform the residents of Nunavut of its activities, which may include the holding of public meetings.¹⁶⁵

As can be seen from its mandate, the NIC will play a very significant role in developing the institutions which will shape the government of Nunavut. Due to its important role, it was recognized that the NIC should be at arms-length from all three parties involved and the Act is careful to state that the NIC is a tripartite body and not an agent of the federal government.¹⁶⁶

It would appear that the Inuit have an excellent foundation on which to implement their government and regulatory agencies. In this way, they have done well to avoid the weaknesses of some other Aboriginal agreements. These precise provisions for the implementation of self-government for the Inuit will help the transition to a mature government go more smoothly. It should help the Inuit achieve their goal of self-government without the spirit and intent of their agreements being undercut by implementation difficulties.

The Inuit have also created very specific guidelines for implementing the agencies established in *The Agreement*.¹⁶⁷ These guidelines were consolidated in a contract between the TFN and the Government of Canada and the Government of the Northwest Territories.¹⁶⁸ This document sets out time-frames for particular activities, projects and obligations, states who is responsible for carrying out these tasks, provides funding guidelines for each task, and provides for monitoring to determine if tasks are being carried out properly and in a timely fashion.¹⁶⁹

Partners in Confederation,¹⁷⁰ as well as other Aboriginal documents, expresses the view that more than one model of self-government implementation is available for Aboriginal Peoples to

¹⁶⁴ *Ibid.* at s.58.

¹⁶⁵ *Ibid.* at s.59.

¹⁶⁶ *Ibid.* at s.61(3).

¹⁶⁷ *The Agreement*, *supra* note 3 at Art. 37.

¹⁶⁸ Canada, Department of Indian Affairs and Northern Development, *A Contract Relating to the Implementation of the Nunavut Final Agreement*, (Ottawa: Minister of Supply and Services, 1993).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Partners in Confederation*, *supra* note 6.

achieve the goal of self-determination. Given the great variety of aspirations, no one model will serve all groups. However, The Royal Commission identified four basic principles which may serve as guidelines for the successful implementation of Aboriginal self-government. "These are (1) group initiative and responsibility; (2) Crown responsiveness; (3) structural flexibility; and (4) fiscal stability and parity."¹⁷¹

With respect to the first principle, a group of negotiators on behalf of the people of the Eastern and Central Arctic initiated the Nunavut proposal¹⁷² and they have been careful to ensure that their proposals reflect the desires of the majority of Inuit in the Eastern and Central Arctic. This support has borne out in the various plebiscite results. The structure of the NIC also attempts to incorporate Inuit concerns throughout the implementation stages. As the NIC contains representatives of the Tunngavik, it is probable that this body will be responsive to Inuit interests. The NIC is mandated to keep the people of Nunavut advised of developments. It also should consult with the Inuit as closely as possible to canvass their views and give them due weight in their advice to government parties.

The agreements reached on the land claims settlement, the *Political Accord*, and the ratification of the *Nunavut Act* demonstrate that there has been positive Crown responsiveness, which embodies the second principle.¹⁷³ This responsiveness must continue throughout the implementation process. The federal government should give significant weight to the recommendations of the NIC and honour its commitments to the people of Nunavut.

With respect to the third principle of structural flexibility, the NIC will decide the form the Nunavut government will take, such as whether it will be a centralized government or one grounded in local and regional forums. Furthermore, the *Nunavut Act* is a flexible document which allows the Legislative Assembly enough

¹⁷¹ *Ibid.* at 41.

¹⁷² The Inuit Tapirisat of Canada first presented their claim in 1976. This body of negotiators was later replaced by the Tunngavik Federation of Nunavut, which was in turn replaced by the Nunavut Tunngavik.

¹⁷³ While the Federal Government has shown positive responsiveness to the Inuit proposals there were certain obstacles placed in Nunavut's path, arguably by the Federal Government. Moreover, Nunavut and its government has been a hard-won victory, taking over 20 years to achieve.

room to structure its administration and organization so to accommodate the particular needs of the Nunavut polity without being required to obtain Parliamentary approval.¹⁷⁴

While the *Nunavut Act* establishes the Nunavut government's full legislative powers, the new government will assume some of its administrative tasks incrementally. To this end, the government of Nunavut is permitted by the *Political Accord* to enter into intergovernmental agreements with appropriate governments to carry out some administrative tasks until the Nunavut government is mature enough to assume these responsibilities.

The resulting flexibility should facilitate the administrative experimentation in which the new government of Nunavut will need to engage. It should also encourage the development of governmental forms particularly appropriate to the needs of the residents of Nunavut.¹⁷⁵

It is important that the Nunavut government not be over-burdened in its initial years, since assuming too many administrative tasks at once could render the government incapable of meeting its responsibilities. This could make Nunavut appear unsuccessful when, in fact, it is simply a young government requiring time to develop.

Fourth, with respect to the funding criteria, it is contemplated that the Nunavut government will be funded by the federal government, through capital funding and block funding as a territory.¹⁷⁶ The *Political Accord* recognizes the desirability of formula-based funding and such funding of the government of Nunavut is likely to be analogous to that currently received by the government of the Northwest Territories.¹⁷⁷ This document also recognizes the importance of continuing the existing scope and quality of services to the people of Nunavut.¹⁷⁸ Government services to the people should not decline in scope or quality upon Nunavut assuming its governmental tasks.

¹⁷⁴ Dacks, *supra* note 40 at 20.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Nunavut Act*, *supra* note 4 at s.41. *Political Accord*, *supra* note 20 at Parts 8.1, 8.2. See Dacks, *supra* note 40 at 53–57 for a more detailed discussion on this topic.

¹⁷⁷ *Political Accord*, *supra* note 20 at Part 8.1.

¹⁷⁸ *Ibid.* at Part 8.5.

While the federal government will consult with the appropriate parties, it retains the sole power to decide what the financial arrangements will be.¹⁷⁹ The degree to which the federal government sees fit to fund Nunavut will have a significant impact on whether self-government can be successfully implemented. Although funding is not stable, a commitment exists to fund the reasonable costs of the implementation and operation of the Nunavut government.

Likewise, the costs of implementing the agencies provided for in *The Agreement* will be borne by the government of Canada.¹⁸⁰ Although these agencies are separate from the implementation of the Nunavut government, they will have a significant impact on Inuit participation in decision-making. The Government of Canada has shown a commitment to fund their implementation.

Nunavut government will also have jurisdiction over direct taxation. However, given the small population base, this will not be a significant contribution to Nunavut revenues. The Inuit do have access to and control over at least some lands and resources, as well as royalty sharing rights. These resources can be drawn on for revenues and economic development which will allow for greater self-sufficiency.

Although not without its weaknesses, measured against the four basic principles for implementing self-government, Nunavut appears to be have a successful implementation plan.

VII. DISTINCTNESS

There are particular reasons why the creation of a public government in Nunavut will lead to self-government for the Inuit in the region. Due to distinct circumstance, this arrangement clearly can succeed in Nunavut, whereas it may not be feasible for other Aboriginal groups.

The first and most obvious distinction is that the Inuit comprise an overwhelming majority of the population in the Nunavut region.

¹⁷⁹ *Ibid.* at Part 8.1 & 8.2.

¹⁸⁰ \$4,000,000 will be provided to the Implementation Fund as capital for the fund. \$13,000,000 will be provided to the Implementation Training Trust for new training programs needed to upgrade Inuit skills. See *The Agreement*, *supra* note 3 at Arts. 37.3.4., 37.4.3, 37.8.1.–37.8.3.

This means that their public government leads to *de facto* self-government.

Furthermore, a land base is required in order to obtain self-government and produce revenues for its functioning. The Inuit have a land base available to them within which to implement their government structure. Many other Aboriginal nations do not have a sufficient land base at the present time to implement a government like Nunavut's.

Another important distinction in Nunavut is that there are no provincial governments to contend with. This makes the creation and delegation of powers much simpler, in that there is no conflict with the provincial governments over distribution of powers under the Constitution.¹⁸¹

The creation of Nunavut and its government can go a long way in furthering the goals of other Aboriginal peoples. Although there is much diversity in the goals and means of attaining those goals among Aboriginal nations, Nunavut will stand as a precedent for self-government, in that it is an opportunity to show that self-government can succeed. This precedent should be used to bolster Aboriginal goals, but not to define the methods of implementing self-government. Due to the varying situations of Aboriginal nations, there can be no one method or model of self-government; each nation must find its own suitable method. Certainly, Nunavut will pave the way for new self-government arrangements and perhaps dispel the fears and concerns of the non-Aboriginal population and their governments who are blocking the road to self-government.¹⁸²

VIII. CONCLUSION

The Agreement and the creation of the Nunavut Territory with its own public government will bring government much closer to the Inuit people. Due to the fact that they are an overwhelming majority of the population in Nunavut, the Inuit will have effective

¹⁸¹ *Aboriginal Self-Government and Constitutional Reform*, *supra* note 7 at 76.

¹⁸² For more information on public attitudes towards Aboriginal self-government see "Excerpts from a Study on Canadian Attitudes Towards Aboriginal Self-Government," in *Aboriginal Self-Government and Constitutional Reform*, *supra* note 7.

control over their governing institutions and will finally have a united voice in the decisions which affect their lives.

The Inuit, through their own government and *The Agreement*, have been endowed with jurisdiction over the minimum critical mass of powers necessary for effective self-government. These powers will provide Inuit peoples with the means to protect and promote the social characteristics and culture of their communities while promoting viable economic development.

The creation of the Nunavut Territorial government is not without its weaknesses. These weaknesses must be dealt with critically by the Nunavut Implementation Commission and the new Nunavut legislature in order to implement a government that will be able to deal with potential difficulties. The most serious obstacle is likely to be financing the creation and operation of this new government. Another fundamental difficulty may arise from the very nature of the government itself, being subordinate to the federal government. Effective self-government for the Inuit is possible in this public model of government, but it is not guaranteed and must be safeguarded so that the Inuit do not lose the control they have struggled so long to attain.

Recognizing that the entrenchment of the inherent right of self-government is still favourable the Inuit have reached a practical compromise which has moved their goal of self-government from a purely rights-based notion into a functional reality. They now have real powers providing a vehicle for self-determination. The Inuit retain the option of forming an ethnic government, if that should prove necessary. However, given the foregoing analysis, public government in Nunavut should be capable of adequately meeting the goal of effective self-government. Of course, this assumes that Inuit people will occupy responsible positions within the Legislative Assembly and the administration of the Nunavut government. Therefore, Inuit training programs will be essential for the success of self-government.

Nunavut is a unique self-government model in that it is the only one of its kind. It is not likely to be a model for other Aboriginal nations given the distinct nature of Inuit circumstances. Nunavut self-government will establish a precedent by demonstrating that Aboriginal self-government can be viable and can co-exist with Canadian federalism.